No. 92-1107

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In The

Supreme Court of the United States

October Term, 1992

STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

Petitioners,

vs.

MR. AND MRS. ALBERT TAYLOR, JR.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit's holding that the laws of the several states determine the recoverability of maritime law punitive damages violates the principle of uniformity in maritime law established by prior decisions of this Court and the substantive jurisdiction reserved to federal courts under the U.S. Constitution.

2. Whether the Fifth Circuit's decision creates a conflict among the circuits.

3. Whether punitive damages may be recovered against an insurer as a matter of maritime public policy.[1]

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[1] The following are parties who have a real or potential interest in the outcome of this case:

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No. _____

In The

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STEWART ARTHUR HOLMES, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY GULF COAST MARINE CERTIFICATE NO. 11877, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; RONALD MALCOLM PATEMAN, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:50/85/1, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER; AND SEUMUS IAIN COWLEY, FOR AND ON BEHALF OF CERTAIN UNDERWRITERS AT LLOYD'S, LONDON, SUBSCRIBING TO INSURANCE EVIDENCED BY COVER NOTE NO. DEL:M822/85, EACH FOR HIS OWN AND NOT ONE FOR THE OTHER,

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Stewart Arthur Holmes, for and on behalf of certain underwriters at Lloyd's, London, subscribing to insurance evidenced by Gulf Coast Marine Certificate No.

11877, each for his own and not one for the other; Ronald Malcolm Pateman, for and on behalf of certain underwriters at Lloyd's, London subscribing to Insurance evidenced by cover note No. DEL:50/85/1, each for his own and not one for the other; and Seumus Iain Cowley, for and on behalf of certain underwriters at Lloyd's, London, subscribing to insurance evidenced by cover note No. DEL:m822/85, each for his own and not one for the other, Petitioners, hereby petition the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on September 24, 1992.

OPINIONS BELOW

The opinion of the Court of Appeals is reported as *Taylor v. Lloyd's Underwriters of London*, 972 F.2d 666 (5th Cir. 1992).

The ruling of the district court is unreported. The case number in the Eastern District of Louisiana is 90-1403.

JURISDICTIONAL GROUNDS

The decision of the United States Court of Appeals for the Fifth Circuit was entered September 24, 1992. No application for rehearing was filed. A suggestion for rehearing en banc was filed which was denied on October 23, 1992. This Court has jurisdiction to review the decision of the Court of Appeals pursuant to 28 U.S.C. 1254.

Jurisdiction in the Lower Courts

The District Court had jurisdiction over the case pursuant to 28 U.S.C. 1332 and 28 U.S.C. 1333. The Court of

Appeals had jurisdiction over the matter under 28 U.S.C. 1291.

CONSTITUTIONAL PROVISIONS

The relevant Constitutional Provisions are set forth in the Appendix. They are: U.S. Const. art. III, § 2 cl. 1, U.S. Const. art. VI, cl. 2.

STATEMENT OF THE CASE

On October 16, 1985, the DMC-1, a self-propelled liftboat bareboat chartered by Drynorth capsized while attempting to jack-up. Mr. Albert Taylor, an employee of Offshore Hammers, Inc., was a passenger aboard the DMC-1 when it capsized.

As a result of personal injuries allegedly sustained in the casualty Taylor and his wife (collectively "Taylor") sued Drynorth in 1986 in the United States District Court for the Western District of Louisiana, asserting claims solely under the general maritime law for both compensatory and punitive damages. The case was transferred to the Eastern District of Louisiana for a jury trial. At the conclusion of trial, a verdict was entered against Drynorth and in favor of Taylor, awarding compensatory damages in the amount of $751,780.00 and punitive damages in the amount of $500,000.00. A judgment reflecting this verdict was entered on September 7, 1989, and the compensatory damages portion was later satisfied by the defendant.

On March 19, 1990, Taylor filed a Complaint for Declaratory relief in state court seeking to enforce the judgment for punitive damages against the subscribers to three insurance policies issued to Drynorth. Taylor

claimed that these policies provided coverage for punitive damages and that the insurers under the three policies were consequently required to pay the punitive damages assessed against Drynorth. On April 18, 1990, the underwriters (now the petitioners herein) filed a petition for removal to the United States District Court for the Eastern District of Louisiana, Civil Action No. 90-1403.

On December 5, 1990, underwriters filed a motion for summary judgment on the basis that, inter alia, the limits of the relevant policies had been exhausted and that punitive damages were not recoverable against an insurer as a matter of maritime public policy. Similarly, Taylor filed a motion for partial summary judgment asking the court to recognize coverage for punitive damages under a $500,000 comprehensive general liability policy.

On February 27, 1991, the district court entered an order and reasons denying Taylor's motion and granting summary judgment in favor of underwriters. The court, applying federal maritime law, held that punitive damages were not insurable as a matter of law. As a result, the court *did not* address any of the important issues of coverage for punitive damages, including exhaustion of coverage or interpretation of the policies involved in the case. Rather, the Court considered all other issues raised in the cross-motions for summary judgment as moot. The order and reasons were made the subject of a Rule 58 judgment entered on July 12, 1991. On July 23, 1991 Taylor filed a notice of appeal in the Court of Appeals for the Fifth Circuit appealing the final judgment.

On September 24, 1992, a three judge panel of the Court of Appeals reversed the decision of the district court and remanded the case so that state law could be

applied. The Court of Appeals based this decision upon its interpretation of *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955).

The Underwriters filed a suggestion for rehearing en banc on October 8, 1992. The Fifth Circuit denied the suggestion on October 23, 1992.

REASONS FOR GRANTING A WRIT

The Court should grant this writ application, not only to correct the erroneous Fifth Circuit decision as it applies to applicants but, more importantly, to prevent the profound negative impact the decision will have on the important issues of maritime law uniformity and federalism.

Specifically, the Fifth Circuit was asked to consider whether, as a matter of public policy, an award of punitive damages under the general maritime law could be recovered from the insurer of the party against whom the damages were assessed. The trial court concluded that, as a matter of law, it could not. In reversing the trial court's granting of summary judgment, the Fifth Circuit viewed the question as follows: 1) Is there well established dispositive maritime precedent on the issue? 2) If not, state law must apply. Finding no controlling precedent, the Fifth Circuit reversed and remanded, ordering the trial court to apply the law of the state with the greatest interest in the controversy.

This amazing abdication of its admiralty jurisdiction by a federal court was premised solely upon a misapplication of this Court's decision in *Wilburn Boat Company v. Fireman's Fund Insurance Company*, 348 U.S. 310 (1955). The Fifth Circuit has now read *Wilburn Boat* to mean that every issue which in any way involves marine insurance

– whether arising in tort or contract – must hereafter be decided by the disparate laws of the several states absent a well established federal maritime law precedent.

In reaching this result, the Fifth Circuit has thoroughly misunderstood the issue before it, and has diminished its ability to define the extent of substantive rights arising solely under the general maritime law in derogation of its own constitutionally mandated jurisdiction. Far from being a *Wilburn Boat* controversy, the issues before the Fifth Circuit and now this Court are: first, the ascertainment of the public policy which prompted the creation of a right to recover punitive damages under maritime law and second, determination of whether that policy allows for recoverability of punitive damages from an insurer. If, as applicants urge, the goal is deterrence, public policy will not be served by allowing a tort feasor to insure itself from a punitive damage award and this Court should so determine. However the Court chooses to resolve the issue, the scope of maritime law punitive damages is inherently an issue of maritime law. Federal courts have the constitutional authority and duty to determine the limitations of this federally created right. Ceding this authority to the several states represents a violation of the Admiralty Clause of the Constitution[2] – which confers exclusive jurisdiction of this issue upon the federal courts – and the Supremacy Clause[3] – which mandates that federal law must take precedence over state law where federal law applies.

Of equal concern to this Court is the effect the Fifth Circuit's ruling will have on the uniformity of maritime

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[2] U.S. Const. art. III, § 2 cl. 1

[3] U.S. Const. art. VI, cl. 2

law. Numerous times – from *The Lottawanna*[4] to *Miles v. Apex*[5] – this Court has reaffirmed the need for uniformity in maritime law. By its terms, the Fifth Circuit decision would potentially permit fifty different rules with respect to the recoverability of punitive damages. This horrible scenario would fragment both maritime insurance and commerce and allow the outcome of lawsuits applying general maritime law to be determined by the fortuity of the state next to which an ocean-going or river vessel is located at the time of collision or accident. If there exists any reason for uniformity in maritime law, it is to preclude such a result.

This Court should additionally grant certiorari to resolve a conflict in its own jurisprudence and among the Circuit courts created by the analysis employed in *Wilburn Boat Company v. Fireman's Fund Insurance Company*[6]. This repeatedly criticized opinion has cast doubt on the future vitality of marine insurance law in particular and maritime law in general for almost forty years. Now, with the Fifth Circuit's decision in *Taylor*, the faulty premise of *Wilburn Boat* – that if there exists no established precedent on an issue of decidedly substantive maritime jurisdiction, the Court may then apply state law – has borne a poisonous fruit which will, if unchecked, systematically destroy the uniformity of maritime tort law. This result is at odds with *Southern Pacific Co. v. Jensen*[7], *Chelentis v.*

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[4] 88 U.S. (21 Wall.) 558 (1875).

[5] 498 U.S. 19 (1990).

[6] 348 U.S. 310 (1955).

[7] 244 U.S. 205 (1917).

Luckenbach[8], *Garrett v. Moore-McCormick*[9], *Moragne v. States Marine Lines*[10], and numerous other decisions – all of which have emphasized the critical importance of uniformity in matters of substantive maritime law. A resolution of this long-standing conflict, now brought sharply into focus by the Fifth Circuit's decision, is imperative if this Court and the lower federal courts are to remain, in any substantive sense, Courts of Admiralty.

I. WHETHER THE FIFTH CIRCUIT'S HOLDING THAT STATE LAW MUST DETERMINE THE RECOVERABILITY OF MARITIME LAW PUNITIVE DAMAGES VIOLATES THE PRINCIPLE OF UNIFORMITY IN MARITIME LAW ESTABLISHED BY PRIOR DECISIONS OF THIS COURT AND THE SUBSTANTIVE JURISDICTION RESERVED TO FEDERAL COURTS UNDER THE U.S. CONSTITUTION.

a. Punitive Damages, and Consequently Their Recoverability From an Insurer, Arise Solely From Maritime Law

The right which enabled Taylor to recover punitive damages against Drynorth and which Taylor is now seeking to expand to include recovery against Underwriters is purely a maritime right created by federal maritime courts. The first error committed by the Fifth Circuit was its failure to recognize the maritime origin of this right and the need to apply maritime law to define the scope of the right.

During the trial of this matter, Taylor sought relief, including punitive damages, under the general maritime law. As a passenger aboard a vessel, Taylor's claim was

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[8] 247 U.S. 372 (1918).

[9] 317 U.S. 239 (1943).

[10] 398 U.S. 375 (1970).

founded upon the general maritime tort law.[11] At no point were state law claims urged by Taylor. Finally, the jury's verdict awarding punitive damages was made pursuant to instructions applying the general maritime law. Therefore, admiralty law furnished the *only* basis for the award of punitive damages.

The right to recover punitive damages had its origins in federal maritime law as early as *The Amiable Nancy*,[12] where the Supreme Court recognized the need to deter wanton or grossly negligent acts at sea. The Fifth Circuit acknowledged the availability of punitive damages arising from the unseaworthiness of a vessel, in *Complaint of Merry Shipping, Inc.* 650 F.2d 672 (5th Cir. 1981), citing the lengthy history of the doctrine in substantive maritime tort law and its avowed goal of deterrence.[13]

Throughout the development of this doctrine, federal courts have shaped and limited the recoverability of punitive damages; e.g., *Kopczynski v. The Jacqueline*, 742 F.2d 555 (9th Cir. 1984), *cert. denied*, 471 U.S. 1136 (1985) (limiting recovery to cases arising under the general maritime law and not under the Jones Act) and *Matter of P&E Boat Rentals*, 872 F.2d 642 (5th Cir. 1989) (ruling that punitive damages are not recoverable against employers without knowledge of employees' willful acts). These

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[11] *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959). Notably, the Fifth Circuit erred in its published opinion when it categorized Taylor as a seaman. Neither the jury nor the trial court found him to be a seaman, nor was Drynorth his employer. *See*, answers to jury interrogatories and judgment of district court in *Taylor v. Drynorth*, attached on pp. 18a-21a of the appendix.

[12] 16 U.S. (3 Wheat.) 546 (1818).

[13] 650 F.2d at 625-6. The referenced quote is set forth at length infra at p.27.

cases recognize that maritime tort law developed a doctrine of punitive damages separate and apart from the common law or the laws of the several states, which must rely upon maritime law principles to give it substance and define its parameters.

b. When a Right of Recovery is Rooted in Federal Maritime Law, the Substance of that Right is Governed by Federal Law.

Because federal admiralty courts created the right to punitive damages in admiralty, these courts must consequently define and shape the contours of that right by applying principles of federal maritime law. This power and obligation to determine issues of substantive maritime law arises both from the jurisdiction conferred by the Constitution and the need for uniformity contemplated by that jurisdiction.

The Constitution invested the federal judiciary with exclusive control of admiralty jurisdiction so that a single uniform body of law would be enforced in all states of the Union, and conform as far as practicable to established principles of international maritime law so that United States law would not conflict with the law of other maritime nations. The crucial goal of this uniformity was the very practical need to protect maritime commerce from conflicting state laws and regulations.[14] To ensure

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[14] The Supreme Court, in *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1875), explained the goal of the Framers in granting admiralty jurisdiction to the federal courts:

> The Constitution must have referred to a system of law co-extensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime

uniformity, the Framers of the Constitution also provided for the supremacy of federal substantive law over state law.[15]

In a pair of decisions at the beginning of this century, the Supreme Court established that a maritime law right is governed by maritime law no matter where the action is brought and emphasized the supremacy of federal maritime law over state law. The Court in *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), explicitly established the supremacy of federal power over state law to promote uniformity of maritime law:

> No [state] legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself. *Id.* at 216.

In *Chelentis v. Luckenbach Steamship Co.*, 247 U.S. 372 (1918) the Court, in addressing the limitations of the

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> law under the disposal and regulation of the several states, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the states with each other or with foreign states. *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1875).

See generally Justice Story's comprehensive analysis in *De Lovio v. Boit*, 7 F. Cas. 418 (C.C. Mass. 1815) (no. 3776).

[15] See, *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917), cited infra.

savings to suitors clause, held that a right sanctioned by maritime law must be determined by maritime law and not common law.[16]

Collectively, *Jensen* and *Chelentis* established that where uniformity or a specific maritime doctrine are at issue, it is the federal judiciary, not the state courts or legislatures, which must create and interpret federal admiralty law – a principle which the Supreme Court has reiterated on numerous occasions.[17]

Ultimately in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), this Court explained the need to create and define both maritime remedies as well as rights. The Court recognized "the incongruity of forcing the states to provide the sole remedy to effectuate duties that have no basis in state policy." The Court observed that "federal law, rather than state, is the more appropriate source of a remedy for violation of the federally imposed duties of maritime law." *Id.* at 357, n. 15.

The doctrine of uniformity is the motive force behind the exclusivity and supremacy of maritime law. The Court in *Moragne* justified creating a wrongful death action under general maritime law because:

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[16] 247 U.S. at 384.

[17] *Garrett v. Moore-McCormick Co.*, 317 U.S. 239, 245 (1943) where the Supreme Court explained the necessity of applying federal law to determine substantive rights by stating:

> The source of the governing law applied is in the national, not the state, governments . . . The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right originates. (citations omitted).

See also *Pope & Talbot v. Hawn*, 346 U.S. 406 (1953).

> it would assure uniform vindication of federal policies, removing the tensions and discrepancies that have resulted from the necessity to accommodate state remedial statutes to exclusively maritime substantive concepts. . . . Such uniformity not only will further the concerns of [federal legislation] but also will give effect to the constitutionally based principle that federal admiralty law should be 'a system of law coextensive with, and operating uniformly in, the whole country.'

398 U.S. 401-402 (citing *The Lottawanna*).[18]

The same logic which compelled the result in *Moragne* applies with equal force to the facts of this case. A single federal rule as to the recoverability of punitive damages from an insurer *would* assure uniform vindication of federal policies and would alleviate the problems associated with accommodating 50 different state laws to a single admiralty right. Ironically, in the very case relied upon by the Fifth Circuit, *Wilburn Boat*, Justice Black recognized the same logical consequences as the *Moragne* Court which arise when a federal court creates a right in maritime law: "[S]hould we attempt to fashion an admiralty rule governing policy provisions, we would at once be faced with the difficulty of determining what should be the consequences of breaches." 348 U.S. at 319. This is

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[18] Most recently in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), the Court exercised its power to determine the scope of damages for a maritime law right that it had judicially created in the *Moragne* decision. In *Miles*, the Court placed limits upon the types of recovery a seaman could obtain under general maritime law. The Court, citing *Moragne*, declared that the federal judiciary was vested with the power to establish maritime law.

precisely what the Fifth Circuit failed to do – by disregarding the federal source of the right to punitive damages, the appellate court failed to "determine the consequences" of the right upon the plaintiff, the defendant and the defendant's insurers.

If the Fifth Circuit's decision is allowed to stand, the recoverability of every maritime punitive damage award in the future will depend entirely upon geography. The potential disruptions upon commerce which would be created by such a rule are myriad. For example, a vessel insurer's potential liability will change every time the vessel moves through the waters of a different state. A vessel owner will need to obtain coverage for every jurisdiction in which he foreseeably will operate. If a vessel goes off course and becomes grounded or collides in an unforeseen state's waters, the vessel's insurance coverage may not provide the vessel owner the same protection as vessel owners regularly operating in the state.

Perhaps the most dramatic potential example is the tort which occurs on the waters directly between two states. Theoretically, a vessel casualty on the boundary between a state where punitive damages are insurable and a state where such damages are not insurable could give rise to a situation where claimants on one vessel may recover punitive damages from an insurer while those on a second vessel – immediately across the state line – may not. Similarly, a deckhand who is injured when the vessel is in Alabama waters may theoretically recover punitive damages from the vessel owner's insurer while if his accident occurs moments later in Florida waters, he may not.

These examples illustrate the randomness which will result in maritime law should the Fifth Circuit decision stand. Whatever message is to be sent by the imposition

of punitive damages in maritime law, if it is to be effective, must be the same message. Otherwise, uniformity will be sacrificed for no apparent gain, save the creation of more work for maritime lawyers. *That* undesirable consequence need not occur if this Court will recognize the federal maritime nature of the right to punitive damages and undertake the analysis overlooked by the Court of Appeal.

c. *Wilburn Boat* is Inapplicable to the Facts of this case.

The foregoing discussion illustrates the uniquely maritime nature of the issue before the Fifth Circuit and the need for a federal maritime rule concerning the recoverability of punitive damages against an insurer. Despite the prevailing considerations of uniformity and the federal nature of maritime punitive damages, the Fifth Circuit abstained from resolving the issue before it, citing *Wilburn Boat* as the foundation for this approach. 972 F.2d at 668. The Fifth Circuit noted that the Court in *Wilburn Boat:*

> . . . determined that there was no federal admiralty rule regarding the breach of warranties in *marine insurance policies* and that the Court would not fashion one, but would instead apply state law.

972 F.2d at 668 (citations omitted) (emphasis added).

Ignoring what it had initially noted in an earlier recitation of the underlying facts – that no issue of interpretation of insurance policies was involved – the Fifth Circuit went on to cite its own jurisprudence for the following startling principle:

> Since 1955, this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require "the application of state insurance law

> principles if there is no specific and controlling federal rule. [T]he *interpretation of a contract* of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law."

972 F.2d at 668 (emphasis added) (citations omitted).

This excerpt from the underlying opinion reveals the point at which the Fifth Circuit's reasoning went astray. At no point was the trial court *or* the Fifth Circuit asked to interpret contracts of marine insurance. To the contrary, the trial court specifically pretermitted consideration of coverage issues and any other issues of contract interpretation so that it could resolve a preliminary issue of tort law – whether punitive damages may be recovered from a party other than the tort feasor.

One would think that the Fifth Circuit could have appreciated the difference between contract and tort law and that *Wilburn Boat*, on its facts, bore no resemblance to the issue before it. Nevertheless, the Fifth Circuit stubbornly asserted that it must apply *Wilburn Boat*, because "interpretation of a contract of marine insurance" compelled this analysis.

A mere reading of *Wilburn Boat* should have convinced the Fifth Circuit that the case had nothing whatever to do with the facts in *Taylor*. The first sentence of that opinion, in fact, succinctly limits its scope to a single issue:

> This case raises questions concerning the power of states to regulate the terms and conditions of marine insurance contracts.

348 U.S. at 311. Nothing could be plainer than this statement by Justice Black. *Wilburn Boat* only applies to interpretation of marine insurance *contracts*. Since *Taylor v.*

Lloyd's did not involve any issue of regulation or interpretation of the terms of a marine insurance contract, *Wilburn Boat* did not apply.

What is astounding about the Fifth Circuit's opinion is that no intellectual attempt was made by that Court to analogize or explain the extension of *Wilburn Boat* beyond its limited facts. The Fifth Circuit, seemingly hypnotized by the words "marine insurance," automatically invoked *Wilburn Boat* with complete disregard for the fact that no contract issues existed and that no court had even applied *Wilburn Boat* to matters of pure maritime tort law.

Almost as troubling as the lower court's unfathomable application of *Wilburn Boat* is its startling misstatement of the analysis employed by Justice Black. At *no* point in the *Wilburn Boat* opinion was any statement made that, "in the absence of a specific and controlling federal rule", state law should govern interpretation of marine insurance. To the contrary, Justice Black prefaced all discussion with the query:

> (1) Is there a judicially established federal admiralty rule governing these warranties? (2) If not, should we fashion one?

348 U.S. at 314.

By requiring the second step, *Wilburn Boat* explicitly recognized the need to look first to the interests of uniformity before resorting to state law. The Fifth Circuit, by contrast, has now chosen to apply the first step alone to a factual situation not contemplated by the holding in *Wilburn Boat*. The result of this ill-chosen shortcut is the creation of a policy in the Fifth Circuit to abstain from any future revision or development of substantive maritime law.

The ultimate consequence of allowing this reasoning to go unchecked is the destruction of maritime law as a

vital, ongoing body of law. If there can be no new precedent in the Fifth Circuit, the admiralty jurisprudence will come to be replaced by state law as the years pass and new issues arise. The easiest and most effective means to assure that this does not continue is for this Court to grant certiorari and explain to the Fifth Circuit that *Wilburn Boat* does not control the outcome of this case or any other case of first impression in general maritime tort law. Rather, where admiralty courts have created substantive rights such as punitive damages, they must fashion not only the right, but the limits of that right.

d. *Wilburn Boat* Should be Limited to Its Facts or Overturned.

Believing that Wilburn Boat therefore has no application to the facts of this case, applicants would urge the Court to grant certiorari and proceed to a determination that punitive damages are not recoverable against an insurer as a matter of public policy. If, however, the court is concerned with the nagging presence of *Wilburn Boat* and the potential further abuse of its reasoning by federal courts, applicants would additionally seek certiorari to have this Court limit *Wilburn Boat* to its peculiar facts, or alternatively, to overturn it as being inconsistent with prior and subsequent Supreme Court decisions.

The *Wilburn Boat* decision has been criticized and questioned practically since the day it was rendered. The decision represents a prime example of a decision designed to achieve a fair result in a case with unusual, difficult facts; a combination which, as Justice Holmes noted, makes for bad law. *Wilburn Boat* did create "bad law" and left a startled maritime community in its wake.

The Supreme Court in *Wilburn Boat* was asked to decide whether the literal performance rule in a warranty in a marine insurance policy should be enforced against the owners of a houseboat situated on the waters of a small artificial lake between Texas and Oklahoma. The houseboat had been destroyed by a fire that was unrelated to the owners' breach of warranty. The Court, reluctant to enforce what to its eyes appeared an unduly harsh rule of strict compliance, instead ruled that although a marine insurance contract is a part of maritime law, state law could be applied to resolve the issue. The Court reasoned that an absence of abundant precedent showed a lack of federal interest in regulating this particular issue. Since states had displayed strong interest in regulating insurance, Justice Black was content to accord them the responsibility for making rules relating to the effect of a breach of warranty. In the case of Texas law, the harmless breach did not void the policy and plaintiffs were not left without a remedy.

The problem with the majority opinion as observed by a concurring Justice Frankfurter and a dissenting Justice Reed, is that, as a whole, a tremendous need exists for uniformity in marine insurance law in particular, and maritime law in general. Stressing the "local" nature of the controversy and the lack of connection to interstate commerce or traditional maritime activity, Justice Frankfurter "joined in a result restricted within this compass."

However, Frankfurter disparaged application of the same analysis where river and oceangoing commerce were concerned, noting:

> The court's opinion goes beyond the needs of the problem before it. Unless I wholly misconceive that opinion, its language would be invoked when cases so decisively different in

> degree as to be different in kind come before this court. It seems directed with equal force to ocean-going vessels in international maritime trade, as well as coastal, intercoastal and river commerce. Is it to be assumed that were the Queen Mary, on a world pleasure cruise, to touch at New York City, New Orleans and Galveston, a Lloyd's policy covering the voyage would be subjected to the varying insurance laws of New York, Louisiana and Texas?[19]

The decisions following *Wilburn Boat* from this Court all suggested that the radical Balkanization of the substantive maritime law to the whims of the several states feared by Justices Frankfurter and Reed would not occur. In several cases, this Court applied federal law to determine the validity of exculpatory clauses in towage contracts, a shipowner's rights to indemnity from a stevedore, and whether the admiralty law recognized the distinction between an invitee and licensee.[20] As one commentator observed, "These rules were no more 'established', than the rule of strict compliance ignored in *Wilburn*."[21] Nevertheless, recognizing its control over the development of substantive maritime law, this Court fashioned law to address new problems in areas where federal, and not state law, governed. In *Kossick v. United Fruit Company*, this Court stated that *Wilburn Boat* had no application to a case involving a maritime contract that

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[19] *Wilburn Boat Company v. Fireman's Fund Insurance*, 348 U.S. 310, 323 (1955).

[20] *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955); *Kemerac v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959).

[21] David Currie, Federalism and The Admiralty: "The Devil's Own Mess" 1960 S. Ct. Rev. 158, 217 (1960).

conflicted with a New York state statute. The Court dismissed *Wilburn Boat* by declaring

> The application of state law in that case was justified by the Court on the basis of a lack of any provision of maritime law governing the matter there presented. A concurring opinion, and some commentators have preferred to refer the decision to the absurdity of applying maritime law to a contract of insurance on a houseboat established in the waters of a small artificial lake between Texas and Oklahoma. Needless to say the situation presented here has a more genuinely salty flavor than that.

Kossick, 365 U.S. at 742.

Many lower courts recognized *Kossick* as a decision which limited *Wilburn Boat* to its facts or at least to interpretation of marine insurance contracts. *D.J. McDuffie v. Old Reliable Ins. Co.*, 608 F.2d 145 (5th Cir. 1979), *cert. denied*, 449 U.S. 830 (1980); *Gulfstream Cargo v. Reliance Ins. Co.*, 409 F.2d 974 (5th Cir. 1969). However, certain panels in the Fifth Circuit, including *Taylor*, ignore *Kossick*[22] and have even gone so far as to state that "despite the language in *Kossick* tending to limit the *Wilburn Boat* opinion to its facts, we believe that *Kossick* did an incomplete job of burying the *Wilburn Boat* obeisance to state contract law in certain cases involving marine contracts." *Irwin v. Eagle Star Ins. Co.*, 455 F.2d 827, 829-830. (5th Cir. 1972), *cert. denied*, 409 U.S. 852 (1972). Now, given the Fifth Circuit's attempted

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[22] *Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862 (5th Cir. 1989).

resuscitation of *Wilburn Boat* as an abstention doctrine, this Court should finish the job.[23]

II. THE FIFTH CIRCUIT'S DECISION IN *TAYLOR* IS IN CONFLICT WITH THE NINTH CIRCUIT'S INTERPRETATION OF *WILBURN BOAT*.

The *Taylor* decision not only misapplied *Wilburn Boat*, it created a conflict with existing Ninth Circuit jurisprudence. The Ninth Circuit, in *Bohemia, Inc. v. Home Insurance Co.*, 725 F.2d 506 (9th Cir. 1984), held that *Wilburn Boat* and *Kossick*, read together, require that state law can only be applied to issues of marine contract interpretation when: 1) no federal rule exists; *and* 2) when no need for uniformity exists. The *Bohemia* court thus recognized the two-part nature of the inquiry employed by this Court in *Wilburn Boat* and the further limitations of the *Kossick* decision.

By contrast, the Fifth Circuit has repudiated *Kossick* and has failed to apply the second prong of the *Wilburn Boat* test. By its failure to consider the need for uniformity of maritime tort law, the *Taylor* decision creates an irreconcilable conflict between the Circuits. This Court should therefore grant certiorari to resolve this serious division among the Courts of Appeal.

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[23] The confusion created by *Wilburn Boat* is illustrated by another Fifth Circuit decision, *Albany Insurance Company v. Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), *cert. denied*, 111 S. Ct. 279 (1991). The court in *Albany* chose to apply state law instead of an established federal rule of Uberrimae Fidei. In so doing, it declared that the application of state law to questions of marine insurance is by now "axiomatic". 927 F.2d at 886 and cited *Wilburn Boat* for the proposition that "the regulation of marine insurance is, in most instances, properly left with the states. *Id.*

III. Maritime law and policy prohibit the recovery of punitive damages from an insurer.

A. The history and purpose behind punitive damages in maritime law.

Having established the exclusive maritime nature of the right and the need for a federal maritime rule, applicants further ask this Court to find, as the district court did, that maritime law should and does prohibit a party from recovering punitive damages against an insured. The first step in this analysis is to examine the nature and purpose of punitive damages in maritime law. As the following discussion illustrates, the maritime law theory of punitive damages is based upon the twin policy goals of punishing individual conduct and deterring other individuals from pursuing the same or similar conduct – goals which are not fostered by allowing the bad actor to insure against such damages.

The first recognized case in U.S. admiralty law dealing with punitive damages was *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818). That case involved an action against the owners of a vessel whose crew plundered a Haitian schooner. Justice Story did not impose punitive damages on the owners, finding them liable only for compensatory damages. In discussing who might be liable for punitive damages in such a case, the court observed:

> If this were a suit against the original wrongdoers, it might be proper to go yet farther [than compensatory damages] and visit upon them in the shape of exemplary damages, the proper punishment which belongs to such lawlessness conduct. 16 U.S. at 558.

Clearly, Justice Story was concerned with identifying and punishing the wrongdoers and saw no point in providing an additional source of recovery for the plaintiffs against the shipowners whose liability would have been purely vicarious. See also *Gallagher v. The Yankee*, 9 F. Cas. 1091, (D.C. Cal. 1859) (No. 5196) aff'd 39 F. Cas. 781, 784 (C.C. Cal. 1859) (No. 18124).

In *Complaint of Merry Shipping, Inc.*, 650 F.2d 622 (5th Cir. 1981), the Fifth Circuit determined that punitive damages may be recovered under the general maritime law upon a showing of willful and wanton misconduct by the shipowner. After reviewing the history of punitive damages in maritime law, the Court summarized the policy reasons for awarding punitive damages in maritime law as follows:

> Punitive damages, long established in our legal system, may be recovered when a wrongdoer has acted willfully and with gross disregard for the plaintiff's rights. They serve the purpose "of punishing the defendant, of teaching him not to do it again, and of deterring others from following his example."
>
> Punitive damages should be available when a shipowner has willfully violated the duty to furnish and maintain a seaworthy vessel. The shipowner's duty stems from the recognition of "the hazards of marine service which unseaworthiness is placed on the men who perform it . . . and their helplessness to ward off such perils." Punitive damages would serve to deter and punish owners whose reckless acts increase these hazards. 650 F.2d at 625-626 (citations omitted).

The same policy reasons have been enumerated in other circuits. See, e.g. *In Re Marine Sulphur Queen*, 460 F.2d 89 (2nd Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Complaint of Cambria Steamship Co.*, 505 F.2d 517 (6th Cir.

1974); *Protectus Alpha Navigation Co., Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540 (11th Cir. 1987), *cert. denied*, 402 U.S. 975 (1975).

This principal was recently reinforced by the Fifth Circuit in *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989). In that decision, the Court held that

> "Punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. In such a case, the corporation itself cannot be considered the wrongdoer. If the corporation has formulated policies and directed its employees properly, no purpose would be served by imposing punitive damages against it except to increase the amount of the judgment."

Because punitive damages in admiralty are imposed solely to punish the wrongdoer, no purpose would be served in imposing the damages on another party – in the case of *P&E Boat Rentals*, the corporate employer – simply because that party can pay the damages. Rather, the deterrent/punishment effect could only be realized by imposing the damages on the actual party committing the offense.

B. The public policy behind punitive damages in maritime law is best served by not allowing defendants to insure against them.

Few courts sitting in admiralty have considered the issue of whether punitive damages may be recovered against an insurer under maritime law. Those which have, however, have uniformly concluded that maritime public policy forbids this result.

Two cases that address this issue are *Dubois v. Arkansas Valley Dredging Company, Inc.*, 651 F. Supp. 299 (W.D. La. 1987) and *Smith v. Frontlawn Enterprises, Inc.*, 1987 AMC 1130 (E.D. La. 1986). In both cases, the courts were confronted by facts very similar to the present case. Both courts held that public policy prevented the assessment of punitive damages against an insurer, concluding that the deterrence of wrongdoing would be undermined. The two decisions relied upon the Fifth Circuit's decision in *Northwestern National Casualty Company v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

McNulty is one of the leading judicial expressions of the theory behind prohibiting the insurability of punitive damages for public policy reasons. The *McNulty* decision, authored by Judge John Minor Wisdom, dealt with the application of Florida and Virginia law concerning punitive damages in an automobile accident. Although this decision does not involve interpretation of maritime law, it does involve consideration of the Florida law of punitive damages which rests on the same principals of punishment and deterrence that are the cornerstone of the maritime law of punitive damages. As Judge Wisdom noted, punitive damages in Florida:

> [I]s an amount allowed over and above actual or compensatory damages. Its allowance depends on malice, moral turpitude, wantonness, the outrageous of the tort, and is awarded as a deterrent to others inclined to commit a like offense. 307 F.2d at 435 (citations omitted).

In *McNulty*, the Court evaluated the impact of allowing insurance for punitive damages when the purpose of such punitive damages was deterrence and punishment. In recognizing the contradiction inherent in such a state of affairs, Judge Wisdom observed as follows:

> Where a person is able to insure himself against punishment, he gains a freedom of misconduct inconsistent with the establishment of sanctions against such misconduct. It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.
>
> If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, in considering the extent of which the public is insured the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payer. Society would then be punishing itself for the wrong committed by the insured." 307 F.2d at 440-441.

Clearly, Judge Wisdom's analysis translates equally well to maritime law where punitive damages are imposed for precisely the same reasons as they are imposed in Florida. No purpose can be served by permitting punitive damages to be insured and consequently allowing a guilty party whom the law seeks to punish to shift the financial responsibility away from himself to an insurance company. Such a result would be not only unfair to the insurance company but more importantly to the vitality of the shipping industry as a whole which the maritime law has always regarded as an important factor in shaping policy. The net effect of allowing insurability for punitive damages is obvious – punitive damages will

be passed on to the public through increased premiums to be borne by overburdened vessel operators who have not participated in any wrongdoing or wrongful conduct. Just as punitive damages are assessed only against those individuals whose conduct is deemed to be willful or wanton and outrageous, so should those damages be paid by the individuals at fault and not indirectly by the public through costs passed on to the premium payer.[24]

CONCLUSION

The importance of granting certiorari in this case cannot be overstated. The misapplication of *Wilburn Boat* by the Fifth Circuit in *Taylor v. Lloyd's* threatens to strangle the future development of maritime tort law. This Court cannot permit a lower appellate court to decline its constitutionally mandated duty to determine the scope of maritime tort rights. To do so is to permit, in one decision, the accumulated precedent from *The Lottawanna* to *Miles v. Apex* to be cast aside, and to disburse Justice Story's cherished body of uniform admiralty law to the fifty states for safekeeping.

Such a dismal result need not occur if this Court will accept the responsibility for fashioning substantive maritime law which the Fifth Circuit believes it no longer possesses. A uniform rule precluding a tort feasor in admiralty from shifting liability to an insurer is consistent

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[24] William L. Prosser, Law of Torts, § 2, at 13 (5th ed. 1984) wherein he states "If punitive damages are supported by any sound policy, that policy would appear to demand that they shall not be covered by liability insurance.

with the deterrent purpose of punitive damages in maritime law and would further maritime commerce by providing a measure of certainty for vessel operators, insurers, and ultimately, the masters, seaman and passengers who work in the maritime industry.

Respectfully submitted,

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Albert TAYLOR, Jr., et al, Plaintiffs

Mrs. Albert Taylor, Jr.,
Plaintiff-Appellant,

v.

LLOYDS UNDERWRITERS
OF LONDON, et al.,

Defendants,

Steward Arthur Holmes, as representative
of Certain Underwriters at Lloyds,
London, Defendant-Appellee.

No. 91-3629.

United States Court of Appeals,
Fifth Circuit.

Sept. 24, 1992.

Injured seaman brought action seeking judicial declaration that earlier federal court punitive damages award in his favor and against company that chartered lift boat, which capsized was recoverable from the company's insurer. The United States District Court for the Eastern District of Louisiana, Lansing L. Mitchell, J., granted the insurer's motions for summary judgment concluding that general maritime law prohibited the collection of punitive damages from insurer. Seaman appealed. The Court of Appeals, Emilio M. Garza, Circuit Judge, held that law of state having greatest interest in resolutions of issue should have been applied, rather than general maritime law, when determining whether injured seaman could recover punitive damages from insurer.

Reversed and remanded.

Michel P. Wilty, Robert Burke Keaty, Keaty & Keaty, Lafayette, La., for Mr. & Mrs. Albert Taylor, Jr.

Paul N. Vance, Winston Edward Rice, Jon Wesley Wise, Rice, Fowler, Kingsmill, Vance, Flint & Booth, New Orleans, La., for appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before SMITH and EMILIO M. GARZA, Circuit Judges, and RAINEY,* District Judge.

EMILIO M. GARZA, Circuit Judge.

This is an appeal from a summary judgment. Albert Taylor, Jr. and his wife[1] originally filed suit against Lloyd's Underwriters, Institute of London Underwriters and Underwriters at Lloyd's, London (collectively "Lloyd's") in Louisiana state court, which Lloyd's later removed to federal court. In this action, Taylor sought a judicial declaration that an earlier federal court punitive damages award in his favor and against Drynorth (USA), Inc. was unrecoverable from Lloyd's, Drynorth's insurer. The district court, concluded that general maritime law prohibits the collection of punitive damages from an insurance company, granted Lloyd's motion for summary judgment. Taylor now appeals. Finding that the district

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* District Judge of the Southern District of Texas, sitting by designation.

[1] Mr. Taylor has since passed away, and Mrs. Taylor is pursuing this action. The plaintiffs will be referred to as "Taylor".

court erred in applying general maritime law to this dispute, we reverse and remand.

I

On October 16, 1985, the DMC-1-a liftboat chartered to Drynorth – capsized in the Gulf of Mexico. As a result of the capsize, Taylor and several other seamen were injured. Alleging that the DMC-1 was unseaworthy, Taylor brought suit against Drynorth in federal court under general maritime law. Following trial the jury returned a verdict, assessing $751,780 in compensatory damages and $500,000 in punitive damages against Drynorth. Drynorth has not operated since 1986 and, at all times relevant to the events surrounding this dispute, Drynorth has been insolvent. Accordingly, Drynorth's insurers paid the majority of the compensatory damages award and will be responsible for the payment of any punitive damages awarded.

Taylor subsequently filed a declaratory judgment action in Louisiana state court against Lloyd's, seeking a declaration that the three insurance policies[2] Lloyd's issued to Drynorth provide coverage for punitive damages and that Lloyd's is required to pay the damages award assessed against Drynorth. Lloyd's removed the case to federal court, and the parties filed cross-motions for summary judgment. Lloyd's argued that coverage for

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[2] The three insurance policies are: (i) Policy/Certificate number 22191 – the Comprehensive General Liability Insurance policy, (ii) Policy/Certificate number 11877 – the Excess Marine Liability Insurance policy; and (iii) Policy/Certificate number 22183 – the Protection and Indemnity Insurance policy.

punitive damages does not exist under any of the three insurance policies covering Drynorth at the time of the DMC-1's capsize. Taylor maintained, however, that the Comprehensive General Liability Insurance (CGL) policy provides coverage for punitive damages.[3]

Although the district court set forth the language of the CGL policy in its Order and Reasons, the district court did not analyze the language of any of the insurance policies to determine whether the language provided coverage for punitive damages; instead, the district court concluded that it had to first determine whether to apply Louisiana state law or general maritime law to the dispute. Concluding that general maritime law applies and that maritime law disallows the recovery of punitive damages from an insurance company, the district court granted Lloyd's motion for summary judgment.

II

Taylor argues that, because Lloyd's removed this case to federal court on the basis of diversity jurisdiction, the

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[3] The CGL policy states in part that:

> the company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of [a] bodily injury or [b] property damages to which this insurance applies, caused by an occurrence . . . , but the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Record Excerpts at tab 5, *Taylor v. Lloyd's*, No. 91-3629 (5th Cir. filed Oct. 22, 1991).

district court, in its capacity as an *Erie*[4] court, should have applied Louisiana law. Taylor argues that the district court erred in applying maritime law and in granting Lloyd's motion for summary judgment. Lloyd's, on the other hand, maintains that the dispute is a maritime matter, and contends that the district court properly applied general maritime law to disallow the collection of the punitive damages award from Lloyd's.

In determining the applicable law governing the interpretation of the CGL policy, our analysis begins with *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337 (1955).[5] In *Wilburn Boat*, the Supreme Court determined that there was no federal admiralty rule regarding the breach of warranties in marine insurance policies and that the Court would not fashion one, but would instead apply state law. *Id.* at 315-16, 75 S.Ct. at 371. Since 1955, this court, in addressing maritime cases, has interpreted *Wilburn Boat* to require "the application of state insurance law principles if there is no specific and controlling federal rule." *Truehart v. Blandon*,884 F.2d at 226, *citing Transco Exploration Co. v. Pacific Employers Ins. Co.*, 869 F.2d 862, 863 (5th Cir.1989); *sell also Ingersoll-Rand Fin. Corp. v. Employers Ins.*, 771 F.2d 910, 911-12 (5th Cir. 1985), *cert denied*, 475

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[4] *Erie R.R. Co. v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938).

[5] Because the CGL policy "insures against certain maritime risks and losses," it provides maritime insurance within the meaning of *Wilburn Boat, supra. See Truehart v. Blandon*, 864 F.2d 223, 226 (5th Cir.1989) (Because the "policy insures against certain maritime risks and losses . . . we conclude that it provides maritime insurance within the meaning of *Wilburn Boat*. . . . "

U.S. 1046, 106 S.Ct. 1263, 89 L.Ed.2d 573 (1986) ("[T]he interpretation of a contract of marine insurance is – in the absence of a specific and controlling federal rule – to be determined by reference to appropriate state law.") *citing Wilburn Boat, supra.*

Lloyd's has presented this court with three cases in support of the proposition that general maritime law prohibits the collection of punitive damages from an insurance company. *See Dubois v. Arkansas Valley Dredging Co.*, 651 F.Supp. 299 (W.D.La.1987); *Smith v. Front Lawn Enterprises, Inc.*, No. 83-5147, 1987 AMC 1130 (E.D.La., Sept. 29, 1986); *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir.1962). However, these cases do not establish a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company.

In *Smith*, the district court considered whether the Protection & Indemnity policy provided coverage for punitive damages claims and, after examining the insurance policy, the court found that the insurance policy in question did not provide coverage for punitive damage claims.[6] The *Smith* court based its decision to disallow the recovery of punitive damages on the specific language of the insurance policy at issue, reasoning that "the clear

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[6] The policy in *Smith* did not expressly enumerate coverage for punitive damage liability. The policy language read in part:

> this Company hereby undertakes to pay such claims as the assured . . . shall have become legally liable to pay and shall have paid on account of: Loss of Life of, or injury to, or illness of, any person.

Smith, 1987 AMC at 1130.

language of this portion of the policy is that payment will be made for injury or illness, thus suggesting compensatory damages." *Smith*, 1987 AMC at 1130. The district court addressed the question whether public policy should permit an insurance company to pay for punitive damages only in the penultimate paragraph of the two-page opinion. That paragraph states: "In conclusion, the Court notes that it has been held, in relation to an automobile liability policy, that public policy forbids an insurer and an insured to enter into an insurance contract covering punitive damages." *Id.* at 1131, *citing McNulty*, 307 F.2d at 432.

The issue whether punitive damages may be collected from an insurance company was also addressed by the district court in *Dubois v. Arkansas Valley Dredging Co.*, 651 F.Supp. 299 (W.D.La. 1987). The *Dubois* court hypothesized that all requisites to a recovery of punitive damages were satisfied – that is, that the insured's actions were willful and wanton and that the insurance policy provided coverage for punitive damages – but then held that, in any event, "enforcement of the insuring provisions of the policy would be contrary to public policy." *Id.* at 302. Relying on *McNulty* and *Smith*, the *Dubois* court concluded that general maritime law prohibits the collection of punitive damages from an insurance company, reasoning that public policy disallows recovery of punitive damages from an insurance company. *Id.* at 302-03.

Both district court cases rely heavily on *McNulty*[7] to arrive at their conclusions that punitive damages are not

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[7] In *McNulty*, after examining an automobile liability policy in a diversity case, the court articulated the policy behind disal-

recoverable against an insurance company under general maritime law. The thirty-year old *McNulty* decision did not even involve federal law; it was a diversity case, where the district court interpreted the public policy of Virginia and Florida. Additionally, *McNulty,* involved automobile insurance, not maritime insurance. The *Smith* court, then, while purporting to rely on *McNulty,* nevertheless primarily based its decision on the express policy language, buttressing its opinion with a citation to *McNulty*. Similarly, in *Dubois,* the court relied on both *NcNulty* and *Smith* to reach its conclusion that maritime law prohibits the recovery of punitive damages from an insurance company. *See Dubois,* 651 F.Supp. at 299.

We find that these cases have not established a specific and controlling federal rule disallowing the recovery of punitive damages from an insurance company. The district court, therefore, should have applied the law of the state having the greatest interest in the resolution of the issues. *See Truehart v. Blandon,* 884 F.2d 223, 226 (5th Cir.1989) ("In identifying the appropriate state law to apply, we look to the state having the greatest interest in the resolution of the issues"), *citing Transco Exploration Co. v. Pacific Employers Ins. Co.,* 869 F.2d 862, 863 (5th Cir.1989). Accordingly, we find that the district court

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lowing wrongdoers to insure themselves against punitive damages, stating:

> It is not disputed that insurance against criminal fines or penalties would be void as violative of public policy. The same public policy should invalidate any contract of insurance against the civil punishment that punitive damages represent.

McNulty, 307 F.2d at 440.

erred in granting summary judgment in favor of Lloyd's on the basis of maritime law.

III

For the foregoing reasons, we REVERSE and REMAND to the district court to determine whether punitive damages may be recovered under the appropriate state law.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 91-3629

ALBERT TAYLOR, JR., ET AL.,

Plaintiffs,

MRS. ALBERT TAYLOR, JR.,

Plaintiff-Appellant,

versus

LLOYDS UNDERWRITERS OF LONDON, ET AL.

Defendants,

STEWART ARTHUR HOLMES, as representative of Certain Underwriters at Lloyds, London,

Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Louisiana

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ON SUGGESTION FOR REHEARING EN BANC
(Opinion September 24, 5 Cir., 1992, ___ F.2d ___)
(Filed Oct. 23, 1992)

Before SMITH, EMILIO M. GARZA, Circuit Judges and RAINEY, District Judge.

PER CURIAM:

(✓) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having

requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

( ) Treating the suggestion for rehearing en banc as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MR AND MRS. ALBERT TAYLOR JR.	:	CIVIL ACTION
	:	NUMBER: 90-1403
VERSUS	:	SECTION LLM
LLOYDS UNDERWRITERS, ET AL	:	(Filed Jul. 12, 1991)
* *	:	

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that judgment be and is entered granting summary judgment in the referenced matter in favor of defendants, Stuart Arthur Holmes, for and on behalf of Certain Underwriters at Lloyds, London subscribing to Gulf Coast Marine Certificate No. 11877, each for his own and not one for the other, Ronald Malcolm Pateman, for and on behalf of Certain Underwriters at Lloyds, London, subscribing to cover note no. DEL:50/85/1 each for his own and not one for another; and Seumus Iain Cawley, for and on behalf of certain underwriters at Lloyds, London subscribing to cover note no. DEL:M 822/855 each for his own and not one for the other, and dismissing with prejudice all claims by plaintiffs, Mr and Mrs. Albert Taylor, Jr., each party to bear its own costs.

New Orleans, Louisiana this 12th day of July, 1991.

/s/ Lansing L. Mitchell
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

MRS. ALBERT TAYLOR	CIVIL ACTION
VERSUS	NO. 90-1403
LLOYD'S UNDERWRITERS	SECTION "LLM"

(Filed
Feb. 27, 1991)

ORDER AND REASONS

This matter is before this Court on Plaintiffs' Motion for Partial Summary Judgment and on Defendant's Cross-Motion for Summary Judgment pertaining to the issue of insurance coverage for punitive damages in this case.

We have carefully reviewed the memoranda submitted by counsel for both parties. Counsel for plaintiff argues that because defendant's counsel removed this case to federal court on the basis of diversity jurisdiction, this Court sits in an "Erie" capacity and must therefore apply Louisiana state law in this matter. Defense counsel maintains that the dispute is a maritime matter, and must be resolved by application of maritime law.

This matter arises out of a judgment rendered by this Court in the case entitled "Mr. and Mrs. Albert Taylor, Jr. v. Drynorth (USA), Inc.," Civil Action No. 89-2623. In that action, the jury awarded plaintiffs $751,780.00 in compensatory damages for injuries sustained by Mr. Taylor as the result of the capsizing of the DMC-1, a vessel chartered and operated by Drynorth. The jury also ordered Drynorth to pay $500,000.00 in punitive damages based on

their finding of gross negligence on the part of Drynorth. This judgment became final on September 9, 1989.

Drynorth was at the time of trial and is now an insolvent corporation and has not operated since 1986. As of this time, the payment of compensatory damages has been made via insurance coverage. Similarly, the payment of punitive damages, if permitted, will not be made by Drynorth, but by defendant Lloyd's Underwriters.

Defendant argues that no coverage for punitive damages exists under the various policies of liability insurance in effect on behalf of Drynorth at the time that the DMC-1 capsized. Conversely, plaintiffs maintain that the language of the Comprehensive General Liability Policy (CGL) does provide coverage for punitive damages.

Regarding the CGL policy, the language in question which addresses the terms and conditions of coverage is found in certificate No. 22191. Under Section I of Form 6395A, the policy reads:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay because of a) Bodily Injury, or b) Property Damages to which this insurance applies, caused by an occurrence, . . . , the company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements.

Hence, the issue as framed by plaintiff's counsel is whether the language of the CGL policy provides insurance coverage for punitive damages assessed against the defendant. Before addressing this issue, however, this

court must first determine whether Louisiana state law or federal maritime law should apply.

Taylor was a Jones Act seaman. His claim arose out of and was tried under maritime law. The policies in question were purchased to provide coverage for Drynorth's maritime operations. This court finds no merit in plaintiff counsel's argument that we must sit in an "Erie" capacity and apply Louisiana state law. Accordingly, the propriety of insurance coverage for punitive damages shall be determined by application of maritime law.

In *Northwestern National Gas Company v. McNulty*, 307 F.2d 432 (CA-5 1962), Judge Wisdom addressed the public policy considerations revolving around insurance coverage for punitive damages:

> The policy considerations . . . would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies, but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

307 F.2d at 441.

McNulty dealt with an interpretation of Florida and Virginia law prohibiting insurance coverage of punitive damages. However, in denying insurance coverage for punitive damages, this same philosophy has been adopted by federal district courts in Louisiana applying federal law. *See Dubois v. Arkansas Valley Dredging Co., Inc.*, 651 F.Supp. 299 (W.D. La. 1987), and an unpublished opinion by Judge Henry Mentz in *Smith v. Front Lawn Enterprise,* No. 83-5147, 1987 AMC 1130 (E.D. La. 1986).

As stated previously, Drynorth is an insolvent company and the payment of any damages would come not from its corporate coffers but from its insurer. Such an act defies the theory of punitive damages and would not punish the wrongdoer.

Because it is the determination of this Court that maritime law shall apply and would deny coverage, the issue of whether the language of Drynorth's CGL policy provides for the payment of punitive damages need not be reached[1].

It is therefore ORDERED that plaintiffs' Motion for Partial Summary Judgment be and hereby is DENIED, and defendant's Cross-Motion for Summary Judgment be and hereby is GRANTED.

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[1] Likewise, we do not reach the issue of exhaustion of policy limits raised by defendant.

New Orleans, Louisiana, this 26th day of February, 1991.

/s/ Lansing L. Mitchell
UNITED STATES SENIOR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

ALBERT TAYLOR, JR.	*	CIVIL ACTION
	*	NO. 89-2623
VERSUS	*	SECTION "LLM"
DRYNORTH (U.S.A.),	*	JUDGE
INC., ET AL	*	LANSING L. MITCHELL
	*	(Filed Sept 7, 1989)

* *

JUDGMENT

This action came on for trial before the Court, the Honorable Lansing L. Mitchell, Senior District Judge, presiding, the issues having been duly tried, a verdict having been duly rendered by the jury on August 11, 1989 in favor of plaintiff, Albert Taylor, Jr., and against defendant, Drynorth (U.S.A.), Inc., and reasons for judgment having been duly issued this date,

IT IS HEREBY ORDERED, ADJUDGED AND DECREEED that there be judgment in favor of Albert Taylor, Jr. and against the defendant, Drynorth (U.S.A.), Inc. for the following amounts:

Physical pain and suffering, past, present and future	$ 25,000.00
Permanent disability	$ 70,000.00
Mental anguish or suffering, past, present and future	$ 175,000.00
Medical expenses, past and future	$ 105,680.00

Loss of past
earnings and
future earning capacity.....$346,100.00

FURTHERMORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Mrs. Albert Taylor, Jr. against Drynorth (U.S.A.), Inc. for loss of consortium in the amount of $30,000.00

ADDITIONALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of intervenors First Horizon Insurance Co. and Offshore Hammers, Inc. in the amount of $90,357.91 paid to Albert Taylor, Jr. for worker's compensation, and in the additional amount of $46,871.74 paid to Albert Taylor, Jr. for medical expenses.

ADDITIONALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment in favor of Albert Taylor, Jr. in the amount of $500,000.00 for punitive damages against Drynorth (U.S.A.), Inc.

FINALLY, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be interest at the legal rate provided by law to run on the amount of $289,939.68 from December 30, 1985 until paid, together with all court costs and expert fees.

New Orleans, Louisiana, this 6th day of Sept., 1989.

/s/ Lansing L. Mitchell
UNITED STATES SENIOR
DISTRICT JUDGE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ALBERT TAYLOR, JR. — CIVIL ACTION

VERSUS — No. 89-2623
c/w 89-2626

DRY NORTH (U.S.A.), INC., ET AL

SECTION "LLM"

INTERROGATORIES

1. Do you find from a preponderance of the evidence that the defendants' negligence was a legal cause of any of Mr. Taylor's injuries?

   Please answer Yes or No. Yes ✓ No _

   If your answer was yes, please go to question No. 2. If your answer was no, do not answer any further questions. Please sign and date the form.

2. What sum of money, if any, do you find will fairly compensate Mr. Taylor for the following damages, if any, he sustained that were legally caused by the accident of October 16, 1985?

A.	Physical Injury, Pain and Suffering, Past, Present and Future;	$ 25,000
B.	Permanent Disability	$ 70,000
C.	Mental Anguish or Suffering, Past, Present and Future	$175,000
D.	Medical Expenses, Past and Future	$105,680
E.	Loss of Past Earnings and Future Earning Capacity	$346,100
	(Total 2A - E above)	$721,780

Please go to question No. 3.

3. Do you find from a preponderance of the evidence that the accident on October 16, 1985, was a legal cause of Mrs. Albert Taylor's loss of consortium of her husband?

   Please answer Yes or No. Yes ✓ No _

   If your answer to question No. 3 is yes, please answer question No. 4. If your answer is no, please go to question No. 5.

4. What amount of money, if any, will fairly compensate Mrs. Albert Taylor for loss of consortium of her husband? $ 30,000

   Please go to question No. 5.

5. Do you find that the acts of defendants were done willfully, intentionally or with callous and reckless indifference to plaintiff's rights so as to entitle him to an award of punitive damages?

   Please answer Yes or No. Yes ✓ No _

   If your answer is no, answer no further questions. Please sign and date the form.

   If yes, please go to question No. 6.

6. What amount of money do you find Mr. Taylor is entitled to recover in the form of punitive damages? $500,000

   Please sign and date form.

   New Orleans, Louisiana, this 11 day of August, 1989.

   /s/ Willard R. Gibbs Jr.
   FOREPERSON

U.S. Constitution

Art. III

Section 2, Clause 1. Jurisdiction of Courts

Section 2. The Judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – To Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Constitution

Art. VI

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the constitution or Laws of any State to the Contrary notwithstanding.

§ 1254. Courts of Appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C.

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

28 U.S.C.

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000 computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) The legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

28 U.S.C.

§ 1333. Admiralty, maritime and prize cases

The district courts shall have original jurisdiction, exclusive of the courts of the States, of:

(1) any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled.

(2) Any prize brought into the United States and all proceedings for the condemnation of property taken as prize.